



Looking Back on a Year of CAPtivating Causes

The Cooperative of American Physicians, Inc. actively supports health-related causes in communities served by our physician members. From local hospitals and fundraising efforts for medical research, to supporting our local youth and women's organizations, CAP's contributions to a variety of causes reflect the value the company places on giving back and being engaged in our communities.

CAP is a longtime supporter of numerous charitable organizations that help those in need, including:

- City of Hope
- Downtown Women's Center
- California Hospital Medical Center Foundation
- Hope for Firefighters — Widows, Orphans & Disabled Firemen's Fund
- YMCA of Los Angeles
- Verbum Dei High School Corporate Work Study Program

As a physician owned and governed organization, CAP is also proud to support:

- California Medical Association
- California Medical Group Management Association
- Los Angeles County Medical Association
- Orange County Medical Association
- Fresno Madera Medical Society
- Kern County Medical Society
- Merced-Mariposa County Medical Society
- Placer Nevada County Medical Society
- San Bernardino County Medical Society
- Sonoma County Medical Association
- Sierra Sacramento Valley Medical Society
- Yuba Sutter Colusa Medical Society
- VIP Physician Resource Center

We'd also like to recognize the following organizations supported by CAP employees and members in 2018:

- Los Angeles Regional Food Bank
- Barney & Barney Foundation
- American Lung Association
- 9/11 Memorial Stair Climb
- Los Angeles Sheriff's Professional Association
- Shasta Regional Community Foundation – Community Disaster Relief Fund
- UAPD – American Union of Physicians & Dentists
- Imagen Foundation
- Broadway Sacramento (formerly California Musical Theater)
- Cystic Fibrosis Foundation (Hike the Halo)
- Association of Black Women Physicians

To learn more about the wonderful organizations CAP, its physician members and its employees support, please visit our website at CAPphysicians.com/causes. ↩

January 2019



Risk Management — and — Patient Safety News



CAP Can Help on Some Non-Patient Actions, Too – If You Let Us Know

by Doug Shin, JD, and Ann Whitehead, JD, RN

CAP members face a variety of challenges in their medical practice in addition to lawsuits by patients. CAP members may also encounter Medical Board inquiries, regulatory investigations or complaints about Medicare/Medicaid fraud or abuse, and even discrimination lawsuits brought by former or current employees.

To deal with these other challenges, all CAP members have valuable benefits available to them through CAP's MedGuard Plan and Employment Practices Plan.

The MedGuard Plan is a benefit that provides reimbursement of up to \$25,000 in legal expenses for qualifying disciplinary proceedings. Under the MedGuard Plan, you may be eligible for benefits related to certain regulatory issues, including:

- Medical Board of California investigations, interviews, and accusations related to patient care – The Medical Board has fielded an increasing number of complaints and referred a substantial number of cases for further disciplinary action. It is often prudent to seek legal assistance from the outset of any investigation.
- Government investigations/lawsuits for alleged Medicare/Medicaid fraud or abuse or alleged violations of HIPAA – These types of investigations often require responses and deadlines that cannot be ignored and should be addressed with the assistance of an attorney.

- Hospital peer review, credentialing, and privileges issues – It can be difficult to navigate the peer review process or to know your rights under the staff bylaws without legal representation.

The Employment Practices (EP) Plan is a benefit that provides reimbursement of up to \$50,000 in legal expenses for qualifying employment events. Under the EP Plan, you may be eligible for benefits related to certain employment issues, including:

- Lawsuits alleging harassment, discrimination, retaliation, or wrongful termination.
- Written charges or allegations brought by California's Department of Fair Employment and Housing or the federal Equal Employment Opportunity Commission for alleged harassment, discrimination, retaliation, or wrongful termination and request a response from the employer.

It is important to notify CAP as soon as possible about any incident, regulatory investigation, or lawsuit that may qualify for these benefits. You should contact CAP immediately about these issues because the reimbursement benefits of the MedGuard and EP Plans do not go into effect until you notify CAP about the incident, investigation, or lawsuit. The reimbursement benefits of the MedGuard and EP Plans do not apply to any legal expenses incurred before you notify CAP about the incident, investigation, or lawsuit.

continued on page 3

By notifying CAP immediately, you will: 1) get a prompt determination of whether the incident, investigation, or lawsuit is eligible for reimbursement benefits under the MedGuard Plan or EP Plan; 2) receive assistance in locating a qualified attorney; and 3) maximize the benefits that may be available to you under these plans.

Please note that there are deductibles, conditions, and exclusions applicable to both plans.

To learn more about the MedGuard Plan or EP Plan, you can access the "Member Login" page and click on the "Member Coverages" tab. To report an incident, investigation, or lawsuit that may be eligible for MedGuard Plan or EP Plan benefits, please contact

the Claims and Risk Management Hotline at 800-252-0555.

Additionally, the CAP Physicians Insurance Agency, Inc. (CAP Agency) can provide you with information regarding Meddefense Plus and Employment Practices insurance that will provide you added protection with additional coverage and policy limits. ↩

Doug Shin, JD is CAP's Associate Counsel, and Ann Whitehead, JD, RN, is CAP's Vice President of Risk Management and Patient Safety. Questions or comments related to this article should be directed to dshin@CAPphysicians.com.

Risk Management Services for Members

CAP's Risk Management and Patient Safety Department is here for you. If you need advice or have questions regarding medical professional liability risk, call the CAP Hotline at **800-252-0555** or send an email to **riskinternet@CAPphysicians.com** to address the needs of your practice. Following are some of the risk management services available to our member practices.

Practice Survey

An assessment of office practice systems and medical records with recommendations for improvement.

CAP Cares (Apology and Disclosure Program)

An early intervention program that provides support to members in the immediate aftermath of an adverse outcome.

Risk Management/Adverse Event Hotline

Available 24/7 for risk management questions and concerns.

Patient Assistance Services

A program designed to assist patients with incidental costs incurred due to an unanticipated outcome.

Practice Survey of Hospital Specialty Services (Radiology, Pathology, Hospitalist, Anesthesiology, Neonatology)

An onsite review (or phone assessment) review of identified risk issues of specialty and hospital-specific risk issues.

Office Staff In-Service

Physician/staff education in a scheduled, formal presentation of specific risk management issues with distribution of related risk management materials.

Correction

In the print version of the December 2018 issue, we incorrectly stated that service animals are not protected by the law. The paragraph should have read that emotional support animals are not afforded the same protections as service animals.

Are the Bad Guys Winning?

The results are in and the answer is yes! The Ponemon Institute interviewed more than 2,200 IT, data protection, and compliance professionals from over 450 companies that had a recent data breach, and its **2018 Cost of a Data Breach Study: Global Overview** reveals lessons from which we can all learn.

Statistics Are More Than Just Numbers – They’re Consequences

- The average total cost of a breach in the U.S. is \$7.91 million (more than double the global average of \$3.86 million).
- Data breach costs have increased by 6.4 percent from 2017.
- The number of compromised records rose by 2.2 percent.
- Heavily regulated industries, such as healthcare and financial organizations, pay substantially more than other industries when data is compromised.
- A data breach due to malicious or criminal activity costs \$157 per record, while the cost for breaches caused by system and human errors were \$131 and \$128, respectively.

Key Factors That Influence Cost and What You Can Do

These days, it’s not a matter of if but when a breach will happen to you. The Study offers helpful tips to reduce the cost in the event of a breach.

1. Pay less by finding and fixing it fast

The Study found that the quicker a company acts, the less a breach may ultimately cost. When considering a timely response, companies who identified a breach in less than 100 days saved more than \$1 million. Likewise, organizations that contained or resolved a breach in less than 30 days saved more than \$1 million as well. Consider an **intrusion detection system** (IDS) to monitor your environment for malicious activity or policy violations, so you can quickly identify any unauthorized access and save money in the long run.

2. Create an incident response team

The Study also found that having a capable incident response (IR) team reduced the cost of a breach by almost \$14 per compromised record. That may not sound like a lot, but multiply it by the average number of records compromised during a breach, and the numbers quickly add up. If you don’t have an IR plan and team in place, build one and test it regularly. The Study provides tips for **building a business case** for an Initial Response Plan, so you can quantify why your organization needs one.

3. Encryption cuts costs even further

Want to bring that per-record cost down even more? Encryption reduced costs by \$13 per record. Encrypting stored personally identifiable information **saves you legal and notification costs** should an incident occur.

4. Limit your dependence on these factors

Third-party involvement, extensive cloud migration, compliance failure, and the extensive use of mobile platforms all increase the cost of a data breach.

The Study is an annual reminder that, while breaches are expensive, certain measures can be taken to reduce the costs that follow. Download a complete copy of the Study at <https://www.ibm.com/security/data-breach> to learn how your organization can put its findings to work.

5. Make sure you have insurance

Make sure you are protected with an insurance policy. A CyberRisk insurance policy will not only cover you for the costs of a data breach, it will provide you with knowledgeable experts and legal advice to take the actions you need.

CAP Physicians Insurance Agency can provide you with CyberRisk Insurance designed to complement your \$50,000 insurance coverage benefit you get with your CAP membership, and it is surprisingly affordable. Give us a call at 800-819-0061 or e-mail us at CAPAgency@CAPPhysicians.com today to make sure you have the coverage you need to protect your practice. ↩



Purchasing or Leasing New Office Space in 2019? Let Bailes & Associates Help ... and Get You Paid for the Transaction!

If you're planning to purchase or lease new office space in the coming year – or just need expert support renegotiating your current lease – you'll definitely want to speak with a dedicated physician consultant from Bailes & Associates, a valued CAPAdvantage* program vendor.

Not only are all of Bailes' services free to CAP members, upon completion of your lease or purchase contract, Bailes will pay you 10 percent of its collected from the landlord.

If this extra cash isn't enough to sway you, here are four more compelling reasons to consider Bailes for your commercial real estate transactions:

1. You will work closely with an experienced broker who specializes in medical practice leases and understands the unique needs of physicians and their practice requirements.

2. Bailes only represents tenants, so there's never a conflict of interest – only impartial guidance, valuable leverage, and passionate tenant representation.
3. Your broker is a tenacious negotiator, always striving to achieve ideal terms and minimize costs throughout the life of your lease.
4. You'll receive full-service transaction and consulting services – from strategic planning, to market research, to vigorous and innovative negotiation, so you can secure the best deal based on your immediate needs and future vision.

No matter where you're located in California, a Bailes broker will provide you with personalized service and exceptional care. ➦

For more information, contact:

Gary Pepp Senior Vice President/Physician Consultant
310-445-4300 (Southern California)
916-512-8591 (Northern California)
562-743-1695 (Cell)
gpepp@bailesre.com

*CAPAdvantage is a program of the Cooperative of American Physicians, Inc. that offers members a suite of no-cost or competitively priced practice management benefits extending beyond our superior medical malpractice and risk management protection.

The Cooperative of American Physicians, Inc. and subsidiaries contract to receive compensation from certain product vendors as commissions or marketing fees. CAP uses these funds to control costs and provide additional services to its members.



Case of the Month

by Gordon Ownby



Court Explains ‘Implied Malice’ in Upholding Physician’s Murder Convictions

The Court of Appeal has found a substantial basis for a physician’s second-degree murder convictions arising out of the doctor’s drug prescriptions to three patients. By articulating the “implied malice” required for the convictions, the appellate court explained how circumstantial evidence of the physician’s state of mind could be accepted by a jury to convict the physician of murder.

As a licensed physician, Hsiu Ying Lisa Tseng operated a general medical practice with her husband. According to the facts accepted by the Court of Appeal, after Dr. Tseng joined the clinic in 2007, the Advance Care AAA Medical Clinic in Rowland Heights went from serving predominantly local Hispanic and Asians who paid through insurance to serving a clientele of mostly young, largely cash-paying white males from outside the area seeking pain and anxiety management medications.

In July 2012, Dr. Tseng was arrested and charged with three counts of second-degree murder in the deaths of patients Vu Nguyen, Steven Ogle, and Joseph Rovero. The convictions involved treatment by Dr. Tseng of three years for Mr. Nguyen, several weeks for Mr. Ogle, and a single visit with Mr. Rovero. Mr. Nguyen’s treatment by Dr. Tseng included prescriptions for Xanax, Norco, Vicodin, and Opana for back and neck pain, plus Adderall on the patient’s claim that he had been diagnosed with attention deficit disorder. Following Mr. Nguyen’s death,

Dr. Tseng told the coroner’s investigator that Mr. Nguyen was always seeking more medication and stronger doses.

At trial, the prosecution presented evidence that Tseng had no treatment plan for Mr. Nguyen, did not obtain information to corroborate her patient’s pain and anxiety, did not complete an adequate physical examination, and did not contact Mr. Nguyen’s other physicians.

When Mr. Ogle sought treatment from Dr. Tseng, he told her he was taking six to eight tablets of OxyContin daily, using heroin, and that he wanted to take methadone to treat his addiction. Though not a licensed addiction specialist, Dr. Tseng prescribed Mr. Ogle Xanax and methadone, for which he returned twice over four weeks to obtain refill prescriptions. Mr. Ogle died two days after the third prescription and near his body were nearly empty bottles of the Xanax and methadone plus a third bottle containing OxyContin that had been prescribed three months earlier by another physician. The coroner’s opinion was that Mr. Ogle died of “methadone intoxication.”

At trial, the prosecution presented evidence that Dr. Tseng’s treatment of Mr. Ogle represented an extreme departure from the standard of care in various ways, including that she was not a licensed addiction specialist and did not have training to monitor Mr. Ogle’s methadone use.

Treatment of Mr. Rovero, a college student from Arizona, involved just one visit for his complaints of

January 2019

back pain, wrist pain, and anxiety. Mr. Rovero told Dr. Tseng that he had been daily using high doses of OxyContin and Xanax, plus the muscle relaxant Soma, and requested the same prescriptions. Dr. Tseng prescribed Roxicodone, Soma, and Xanax. Mr. Rovero died nine days later with empty bottles near his body for the medications prescribed by Dr. Tseng. After his death, Dr. Tseng told investigators that her goal had been to wean Mr. Rovero from opioids and that she had reduced the doses of the drugs he had been taking by 80 percent. At trial, prosecutors presented evidence that such a drastic reduction Mr. Rovero would suffer from withdrawals and that her prescriptions likely increased his potential for overdose because Dr. Tseng failed to verify the doses of the earlier prescriptions from other physicians.

Also at trial, the prosecution presented evidence on six additional patients – all in their 20s and early 30s – who died shortly after filling prescriptions for controlled substances that Dr. Tseng had written for them.

On appeal, Dr. Tseng contended that her convictions should be overturned because of a lack of substantial evidence that she acted with the implied malice. She argued that though she acted with negligence sufficient to support convictions for involuntary manslaughter, there was no evidence she acted with “conscious disregard” for her patients’ lives.

In the unanimous opinion, the Los Angeles-based Court of Appeal explained in *The People v. Hsiu Ying Lisa Tseng* that implied malice exists when an intentional act naturally dangerous to human life is committed “by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.”

The appellate court began its analysis of the convictions by stating its recognition that a departure from the medical standard of care alone is not sufficient to support a finding of implied malice. The court then commented that Dr. Tseng’s experience and medical training regarding opioids

and other controlled substances “endowed her with special knowledge of [the] dangers” of the drugs she prescribed and that the combination of the prescribed drugs, often with increasing doses, posed a significant risk of death.

The court also noted that after larger pharmacies raised questions with Dr. Tseng over her prescriptions and ultimately stopped filling her prescriptions, the physician sent her patients to small “mom and pop” pharmacies. According to the court’s written opinion, Dr. Tseng knew some patients were obtaining similar prescriptions from other doctors, but did not contact those other doctors (or the CURES database) to find out more about those prescriptions. The court also noted that in the course of treating Mr. Nguyen, Mr. Ogle, and Mr. Rovero, she became aware of an increasing number of deaths of other patients with similar drug profiles following her prescriptions of medications for them.

In the case of Mr. Nguyen, the court stated: “A reasonable jury could infer from [the] evidence that Tseng was aware Nguyen was abusing the opioids and sedatives she had prescribed, and that by continuing to prescribe the drugs in greater amounts and stronger doses, Tseng acted in conscious disregard for his life.”

The court also found substantial evidence that Dr. Tseng acted with implied malice in treating Mr. Ogle. The court noted in particular that though Dr. Tseng observed Mr. Ogle was suffering from drug withdrawal, she did not refer him to an addiction specialist, but “just wrote him refill prescriptions.”

Finally, the court found substantial evidence to support implied malice in treating Mr. Rovero.

“By the time she prescribed drugs for Rovero . . . Tseng knew that eight of her patients . . . had died shortly after she had prescribed the types of drugs Rovero sought. Even armed with this knowledge, she continued to prescribe dangerous drugs in conscious disregard for Rovero’s life.”

The court rejected Dr. Tseng’s assertion that because coroner and police investigators never informed her that she was responsible for the deaths of the three victims or the deaths of other patients, her continued prescribing practices did not show the necessary reckless mindset to support a finding of implied malice.

“[E]ven accepting Tseng’s claim that investigators did not expressly inform her that she was directly responsible for the deaths of Nguyen, Ogle, Rovero, or other patients, her conduct after learning of these deaths demonstrated she was aware of the lethal consequences of her prescribing practices,” the court explained. “For example, Tseng placed ‘alerts’ in the patient files indicating they died of suspected drug overdoses. She also altered patient records after she learned she was under investigation.

“From this evidence and other circumstantial evidence in the record, a jury could have reasonably found that Tseng knew the cause of Nguyen’s, Ogle’s, and Rovero’s deaths and her role in their demise. In sum, substantial evidence supports the jury’s findings of implied malice.” ➤

Gordon Ownby is CAP’s General Counsel. Questions or comments related to “Case of the Month” should be directed to gownby@CAPphysicians.com.



**REFER YOUR
COLLEAGUE
to CAP**

[CAPphysicians.com/refer](https://www.capphysicians.com/refer)



COOPERATIVE OF
AMERICAN PHYSICIANS

Cooperative of American Physicians, Inc.
333 S. Hope St., 8th Floor
Los Angeles, CA 90071

PRESORTED
STANDARD
US POSTAGE PAID
LOS ANGELES, CA
PERMIT #1831

January 2019

IN THIS ISSUE

- 1 Looking Back on a Year of CAPtivating Causes
- 2 Risk Management and Patient Safety News:
CAP Can Help on Some Non-Patient Actions, Too – If You Let Us Know
- 4 Public Policy:
Will Healthcare-for-All Come to California?
- 5 Are the Bad Guys Winning?
- 6 Purchasing or Leasing New Office Space in 2019?
Let Bailes & Associates Help ... and Get You Paid for the Transaction!
- 7 Case of the Month:
Court Explains 'Implied Malice' in Upholding Physician's Murder Convictions

CAPSules® is a publication of the Corporate Communications Department of the Cooperative of American Physicians, Inc.
333 S. Hope St., 8th Floor, Los Angeles, CA 90071 | 800-252-7706 | www.CAPphysicians.com.

We welcome your comments! Please submit to communications@CAPphysicians.com.

The information in this publication should not be considered legal or medical advice applicable to a specific situation.

Legal guidance for individual matters should be obtained from a retained attorney.